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MONTANA PROSECUTOR

JANUARY/FEBRUARY, 1980 Vol. 4, No. 1

INTRODUCTORY NOTES

Senate Bill 1983

Senate Bill 1983, introduced last November by Senator Mathias and referred to the Senate Judiciary Committee allows a state criminal defendant, or a person who has reason to believe that he'll be one, to go to the nearest federal district court and seek an injuction against a state prosecution by alleging that the prosecution has undertaken the case in bad faith.

Spouse Abuse Reporting Forms

A six month supply of forms is enclosed and should be used to report beginning with the month of February, 1980.

Evolution Of The Law Of Search And Seizure

"There was a time when a search by any person other than an officer of the prosecuting government was considered beyond the scope of constitutional prohibitions against unreasonable searches and seizures, and the evidence obtained by such searches was freely accepted by the courts. But in recent years it has come to light that our judicial forefathers were wrong in this concept and that the same Constitution now forbids this practice. There was also a time when the state of the Union possessed the capacity to determine their rules of evidence in criminal cases when searches and seizures were involved. But, again, more modern perception has discovered in the language of the founding fathers meanings hidden for nearly a century, and it has even more recently been ascertained that the Federal Constitution requires that state courts be bound by federal decisions on the admissiblity of such evidence."
Hicks v. State, 156 So.2d 22.

JAMES A. SPALL AND RANDY HERGESHEIMER

On February 20, 1980 while involved in a major investigation Assistant Attorney General James A. Spall and Criminal Investigator Randy Hergesheimer were involved in a tragic accident near Butte, Montana. Randy was killed as a result of the accident and Jim was critically injured. Jim is still at St. Patrick's hospital in Missoula. He has been improving although he has not regained consciousness as of this writing. As a result, the prognosis for the future is not yet known. Jim became associated with the Department of Justice in September, 1978 and greatly enhanced the ability of the County Prosecutor Services Bureau to respond to requests for assistance through his dedicated, uncompromising service and considerable talents. We are all hoping and praying for his speedy and complete recovery. Randy joined the Department of Justice, Criminal Investigation Bureau in April, 1977. Since that time it has been the special privilege of many of us to know and work with Randy. He was an extremely talented investigator and a good friend. We will all miss him.

RECENT CASES AND NOTES

SEARCH WARRANTS - AFFIDAVIT - INFORMANT - RELIABILITY

A statement in an affidavit in application for a search warrant to the effect that the informant was reliable because he had never been arrested or a suspect in a crime, was gainfully employed and was a registered elector in the county, was sufficient to establish a substantial basis for crediting the hearsay statement of the informant that suspected marijuana was located on the premises to be searched. The Court also ruled that where the trial court had held that the informant's identification of "suspected marijuana" was insufficient to establish probable cause for issuance of the search warrant, that the court had applied too strict a standard. The use of the word 'suspected' must, of necessity, be implied in all search warrants. Commonwealth v. Gelfont, 399 A.2d 414, Pa.App., 1979.

SEARCH INCIDENT TO ARREST - SCOPE - WALLET - DELAY

Where defendant was arrested for burglary, a proper search incident to his arrest under the doctrine of United States v. Robinson, 414 U.S. 218, (1972), included the seizure of his wallet from his person and an inspection of the contents of the wallet for weapons and evidence. A delay of less than one hour from the time of the arrest to the search of the contents of the wallet did not change this result. At the time the wallet was taken from the person of the defendant, the arresting officer was entitled under Robinson to inspect the contents of the wallet for weapons and to seize evidence in order to prevent its concealment or destruction. The delay in searching the contents of the wallet was not too remote in time from the arrest, considering that the arrest, questioning and search of the wallet occurred in less than a one-hour period, and the processing of defendant, filing reports, booking and placing defendant in jail, had not been completed. This delay did not vitiate the search as incident to arrest. State v. Nesmith, 253 S.E.2d 594, N.C.App., 1979.

MIRANDA - CUSTODY - MURDER SCENE INVESTIGATION - GENERAL ON-THE-SCENE INVESTIGATION

Where a police officer, responding to a radio call that a person was bleeding, arrived at the scene, and equipped with no other information than a woman's statement that "they" had had a fight, found the defendant kneeling beside a woman's body, supporting her head in his hand and repeatedly asking the police officer to help her, and where the presence of blood stains on the defendant's hands and torso was not necessarily suspicious under the circumstances, and where the officer's professed motive in moving the defendant into a laundry room in the house for questioning was "to try to calm him down," the questioning over a period of ten minutes was ruled general, routine and necessary to a preliminary investigation, and not custodial within the purview of Miranda. Borodinev. Douzanis, 592 F.2d 1202, 1st Cir., 1979.

ADMINISTRATIVE SEARCHES - BOOKING SEARCH - NIGHT BAG

A search of the defendant's overnight bag at a jail during a booking process was ruled constitutionally impermissible in State v. Southwell, 369 So.2d 371, Fla. App., 1979, where the police officers had complete control of the bags and it would have been impossible for defendant to have any access to the bags for any purpose. "We are not here concerned with what the law may have been with reference to a search of the defendant's overnight bag had such a search been made at the time the officer discovered the presence of the cocaine in the baggie removed from the defendant's pocket [at the time of his arrest], or if the search had been made within a reasonable period of time thereafter at the premises at the security office [place of arrest] as an incident to the arrest of the defendant for the unlawful possession of cocaine. We have an entirely different factual situation. The officers had complete control of the overnight bag, such control on the part of the officers was exclusive and under such circumstances that it would have been impossible for the defendant to have any access to the bag for any purpose. There was no danger that anyone acting in his behalf could open the bag for any purpose. So, we simply have the question whether under such circumstances, there being a complete absence of exigent circumstances, a warrantless search of personal baggage is constitutionally permissible. We perceive that the answers to this question is discoverable in United States v. Chadwick, et al, 433 U.S. 1...(1977)." The Court was not impressed with the point that there would have been an inconvenience on the part of the police in preparing an affidavit and to cause the same to be brought to a judicial officer for the issuance of a search warrant.

STOP AND FRISK - REASONABLE SUSPICION - NATURE OF ENCOUNTER

Where criminal narcotics agents approched the defendant at an airport and identified themselves as law enforcement officers and requested permission to inspect the defendant's ticket, this did not rise to the level of a Fourth Amendment Terry-type encounter that required reasonable suspicion. This encounter was not precipitated by force, there was no physical contact, and the only show of authority occurred when the agents initially approached defendant and identified themselves as federal law enforcement officers, which, by itself, did not escalate the setting to a Terry-type stop. "The only show of authority occurred when the agents initially approched [defendant] and identified themselves as federal law enforcement officers. Such identification is insufficient to convert an encounter, otherwise regarded as outside the purview of the Fourth Amendment, into the Terry stop. Additionally, the time of the conversation as well as the events that occurred indicated that defendant was not compelled to continue the encounter. A seizure within the purview of the Fourth Amendment, however, did occur when an agent took defendant's ticket to the airline counter to check out the defendant's story. United States v. Elmore, 595 F.2d 1036, 5th Cir., 1979.

STOP AND FRISK - REASONABLE SUSPICION

Where a woman who had just gone from her car to a police car, told the officer that a passenger in her car was probably armed with a gun and had threatened her life and had narcotics in his possession, the officer was justified in forcibly stopping the passenger and patting down the clothing of the passenger. As it turned out, the pat-down did not reveal the presence of any weapons or weapon-like objects. While the passenger was standing outside the car with his hands on the roof out of reach of a burlap bag which was inside the automobile under the front seat with its top tied, and the officer was armed and in control of the situation, the officer forced the passenger to pull the bag from the car, open it, and empty its contents on the street. The Court found that there was no necessity for the officer to do this for his own protection or that of others. The nature and scope of the search of the bag was found to be so clearly unrelated to the limited self-protective search for concealed weapons that it rendered the evidence found in the bag inadmissible. State v. Greenwald, 369 So.2d 1317, La., 1979.

MIRANDA - WAIVER - JUVENILES

Holding that a juvenile's Fifth Amendment rights cannot be waived on his or her behalf by a parent, see Matter of Welfare of S.W.T., 277 N.W.2d 507, Minn., 1979.

JURY - SELECTION - VOIR DIRE - PROSECUTOR'S STATEMENT PERTAINING TO PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Where a prosecutor stated on voir dire, while attempting to explain to the jury the presumption of innocence and burden of proof, that defendant did not have to go forward with any evidence if he did not wish to and that he did not have to take the stand if he did not want to, was held to be of such a character that the jury would naturally and necessarily be influenced so as to deny defendant a fair trial. "We believe and hold that the italicized language used by the Assistant Prosecuting Attorney was of such character that the jury would naturally and necessarily be influenced so as to deny appellant a fair trial. Conduct which naturally and necessarily has the effect of denying an accused a fair trial can never be harmless." State v. Lindsey, 578 S.W.2d 903, Mo., 1979.

HELLO, SON!
HELLO, POP. THANKS FOR COMING.
I.. I.. GOT HERE AS SOON AS I COULD. THE SHERIFF.. HE SAYS IT'S A DRUG RAP YOU'RE BEING HELD FOR.. THAT IT LOOKS BAD.. MAYBE A LONG SENTENCE.. I COULDN'T BELIEVE MY EARS..
9
YOU KNOW, YOUR MOTHER IS GOING TO BE VERY UPSET, SON..
OH, POP, I FEEL JUST AWFUL!
SHE WAS REALLY COUNTING ON YOU TO HELP HER WITH THE GARDEN THIS SUMMER..
I KNOW, POP, I KNOW

HEARSAY - EXCEPTION - CO-CONSPIRACY EXCEPTION

The co-conspirator exception to the hearsay rule provides that acts and declarations of a co-conspirator in furtherance of the conspiracy are admissible against another who is a defendant, even when the acts and declarations are made out of the presence of the defendant. No conspiracy need be charged and so long as a prima facia case of conspiracy has been shown by independent evidence, acts or declarations in furtherance of the conspiracy are admissible. However, while the acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his co-conspirators, no act or declaration before the beginnning or after the termination of the conspiracy is admissible against a non-declaring co-conspirator. The issue in this case was whether a conspiracy terminated with the commission of the underlying offense or did it continue thereafter to include acts or declarations directed at concealing the substantive offense. The Court ruled that the co-conspirator's statement implicating the defendant, which was made to a police officer out of the defendant's presence on the morning following the attack on two victims, went beyond a mere narrative and was actually directed toward persuading the police officer to remain silent. Thus the statement was admissible against the defendant after the State established a prima facie case of conspiracy by independent evidence. People v. Meagher, 399 N.E.2d 801, Ill.App., 1979.

DOUBLE JEOPARDY - SAME EVIDENCE - CONSPIRACY AND AIDING AND ABETTING

It has been held that for purposes of the Double Jeopardy Clause a defendant convicted of conspiracy and aiding and abetting the commission of federal wire fraud was convicted of two separate and distinguishable offenses and this did not violate double jeopardy principles (18 U.S.C.A., Section 2, 371, 1343). "As a general proposition, therefore, conviction and punishment for the crime of conspiracy as well as the offense of aiding and abetting does not violate the Fifth Amendment double jeopardy clause because the offenses are separate and distinct." The rule holds true even though basically the same evidence was presented on both charges. "...We hold that there is no violation of a defendant's Fifth Amendment right against double jeopardy when convicted and punished for aiding and abetting as well as conspiring to commit the same offense even where the evidence adduced serves 'double duty' in establishing the elements of both offenses." As the Court notes, "[defendant's] conviction for aiding and abetting the offense of wire fraud was in no way dependent upon a finding of conspiratorial agreement. The fact that most of the evidence served 'double duty' in proving the elements of both offenses is of no consequence." United States v. Cowart, 595 F.2d 1023, 5th Cir., 1979.

DOUBLE JEOPARDY - CONSOLIDATION OF OFFENSES

The State violated the defendant's right against double jeopardy in not moving to consolidate for trial an unsworn falsification offense with theft and conspiracy offenses, where the defendant's unsworn falsifications constituted an effect to avoid prosecution for the theft and conspiracy offenses. It appeared that the defendant's attempt to mislead the police as to his true identity occurred within one half hour of the alleged theft and conspiracy offenses, and while he was still in the company of his accomplices making their "get-away", and the defendant's false statements were relevant evidence against him in his trial for the offenses of theft and conspiracy because his actions in misleading the police reflected a guilty state of mind. "One of the more important considerations in determining whether criminal offenses may and should be joined for trial is where the proof of one offense is relevant to proving the other. See, e.g., ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance Section 1.1(b), Commentary (Approved Draft 1968). Thus, the Commonwealth erred in not moving to consolidate the unsworn falsification offense with the theft and conspiracy offenses for trial." Commonwealth v. Edwards, 399 A.2d 747, Pa.App., 1979.

DISCOVERY - MARIJUANA - INDEPENDENT TEST - APPOINTMENT OF EXPERT FOR INDIGENT DEFENDANT

Where defendant was prosecuted for distributing marijuana refusal to allow him to have a sample of the alleged marijuana for the purpose of conducting an independent test, and refusal to provide him with a court-appointed expert to conduct the test, where defendant was admittedly indigent, constituted a denial of due process. "We conclude that where doubt exists as to whether an independent test of an alleged contraband substance is material and exculpatory and the nature of the substance is critical to the State's case, the defense must be given an opportunity to have an independent determination made. This is particularly the case where the question of materiality turns on expert evaluation of the alleged contraband...A lay person is not equipped to refute an expert determination that a substance is, or is not, marijuana. Without an independent test by an expert, it would be very difficult for defendant or his attorney to effectively cross-examine the state's expert, whether on the validity of the test done, the methods of testing used or the correctness of the test results...To give defendant a sample of the alleged marijuana without an independent expert would be futile." State v. Hanson, 278 N.W.2d 198, S.D., 1979.

THE GUILTY PLEA - VOLUNTARINESS - THE PLEA BARGAIN - BARGAINING AWAY DEFENDANT'S RIGHT TO APPEAL

The Supreme Court of Arizona, overruling prior case law, has held that public policy forbids the prosecutor from, in effect, insulating himself from review by bargaining away a defendant's right to appeal. Thus, the defendant would be permitted to bring a timely appeal from his conviction, even though there had been an agreement struck that he would not appeal. "We hold that the right to appeal is not negotiable in plea bargaining, ..." State v. Ethington, 592 P.2d 768, Ariz., 1979.

ATTORNEY-CLIENT PRIVILEGE

Putting defendant in a position where she either had to invoke her attorney-client privilege on the stand or waive it, was error. State v. Holsinger (Ariz.) 602 P.2d 1054.

HUSBAND-WIFE

Commenting on defendant's exercise of the marital privilege is error, and asking defendant whether the spouse was available as a witness also violates the marital privilege. State v. Holsinger (Ariz.) 601 P.2d 1054.

COUNSEL

Once officers know that counsel is attempting to locate a defendant who is in custody, failure to either let defendant know counsel is attempting to reach him or to let counsel talk to defendant means defendant's subsequent uncounseled statements or resulting evidence can't be used against him. State v. Haynes (Or.) 602 P.2d 272.

CROSS-EXAMINATION - WITNESSES

Where the state's primary witness was staying in different motels under assumed names for security reasons, the court properly refused to allow the defense attorney to ask, on cross-examination, what the witness' current address was. The state made a sufficient showing that the disclosure would be dangerous for the witness. State v. Cuevas (Iowa) 282 N.W.2d 74.

DOUBLE JEOPARDY

A defendant who had been convicted of bank robbery in a federal court could be prosecuted in state court for the same robbery. The state prosecution was not prohibited on either double jeopardy or fundamental fairness grounds. Lavon v. State (Tenn.) 586 S.W.2d 112.

DRUGS AND NARCOTICS

The state's legitimate interest in regulating the use of cocaine is not violative of due process or equal protection. Although cocaine is not a narcotic by pharmacological standards, it may legally be classified as a narcotic. State v. Vernon (Minn.) 283 N.W.2d 516.

LESSER INCLUDED OFFENSE

Where the defendant had broken into the victim's home, seized her and told her he was going to hold her for ransom, he was not entitled to an instruction on the lesser included offense of attempted kidnapping. Although the defendant never had an opportunity to demand the ransom from the victim's husband, the crime of kidnapping was completed when the victim was seized; therefore the instruction on attempt was not necessary. People v. Anderson (Cal.App.) 158 Cal.Rprt. 727.

JURY - HOMOSEXUALS

The court did not abuse its discretion in sustaining the prosecution's challenge for cause of two jurors who testified during voir dire that they would not believe the testimony of an alleged homosexual (robbery victim). State v. Murray (La.) 375 So.2d 80.

MIRANDA

Miranda is unnecessary where questions are asked for a standard administrative purpose (e.g. booking, specifically a security release form) and are not intended or likely to produce incriminating statements. Defendant's failure to list a name she later claimed she was authorized to use when the release form asked for any other names she had used, was properly admitted against her. State v. Kincaide (Or.App.) 602 P.2d 307.

PRIOR BAD ACTS - WITNESSES

The court properly admitted evidence of the defendant's attempts to bribe and also his assault upon a witness who had been subpoenaed to testify for the prosecution. The evidence was relevant to show a consciousness of guilt. (This is the first Delaware car search since Delaware v. Prouse, 99 S.Ct. 1391). Goldsmith v. State (Del.) 405 A.2d 109.

ROBBERY

Defendants, while robbing a motel, took money from a cash register and an employee's wallet, so they could be convicted of two counts of robbery. Dangles v. Commonwealth (Ky.) 586 S.W.2d 16.

RAPE - EVIDENCE DESTRUCTION

Failure to preserve the rape victim's underpants justified the trial court in dismissing the case against defendant, because the defendant contended that if the victim had been raped in the claimed manner the underpants would have been torn. Unfortunately for the majority opinion's "reasoning," her clothing and underpants were not torn. State v. Havas (Nev.) 601 P.2d 1197.

SEARCH WARRANTS - PLAIN VIEW

A tip informing police that defendant had stolen goods on his premises did not invalidate the seizure of stolen goods observed on defendant's premises when the officers served an already secured search warrant on defendant's premises for drugs, approximately one hour after the tip. The tip did not destroy the inadvertance requirement of plain view, since the discovery of evidence need not be entirely inadvertant. (Good discussion of plain view.) State v. Pepe (Conn.) 405 A.2d 51.

SENTENCE - BOND

Citing both the Arizona Supreme Court and Arizona Court of Appeals, the Wyoming Supreme Court holds that defendant is entitled to credit for presentence jail time only when he is held merely because of his inability to make bail. Defendant was not entitled to credit for presentence jail time here when he was held because he violated the terms and conditions of the original release agreement. Jones v. State (Wyo.) 602 P.2d 378.

PRIOR BAD ACTS - REPUTATION

The defense was properly barred under Rule 608 from calling a witness to testify that a state's witness had a reputation of being a middle man for drugs or anything, because the proposed specific instances of conduct did not prove untruthfulness and could only be elicited on cross-examination. The witness could have been asked about his opinion of the state's witness's reputation for truthfulness, but the court did not present this. State v. Littles (Ariz.App.) 600 P.2d 40.

AGGRAVATING CIRCUMSTANCES - DEATH PENALTY

Evidence that the victim had been hit in the face with a bottle, shot three times in the chest, and shot once between the legs after he had died was sufficient to support a finding of the aggravated circumstance that the murder had been committed with a "depravity of mind." Not seeking the death penalty for the 16-year-old codefendant whose involvement was considerably less was proper, and did not invalidate defendant's death penalty. Baker v. State (Ga.) 257 S.E.2d 192.

ARGUMENT

The court did not abuse its discretion by limiting final argument to 45 minutes per side. The court increased the time it normally allowed after it considered the factors involved in the case; and it allowed the defense to exceed the limit by five minutes. United States v. Burnes (5th Cir.) 602 F.2d 716.

ARMED ROBBERY - FIREARM

A gun used in a robbery is a deadly weapon regardless of its operability; and the fact that it is not loaded does not bar the defendant's conviction for armed robbery. State v. Bailey (S.C.) 257 S.E.2d 231.

BURGLARY

A Winnebago mobile home which is used as a residence when its owner is on the road is a residence for the purpose of a burglary prosecution. United States v. Lavinder (4th Cir.) 602 F.2d 639.

COMMENT ON SILENCE

Where the government had produced witnesses to identify the defendants' voices in recorded conversations, the prosecutor's argument that the jury was not familiar with the defendants' voices but that the witnesses were, was not an improper comment on the defendants' failure to testify. The prosecutor had not intended to comment on the defendants' silence; and the character of the remark was not such that the jury would have "naturally and necessarily" understood it as directed at their silence. United States v. Harbin (5th Cir,) 601 F.2d 773.

CONSPIRACY

The acts and declarations of coconspirators in furtherance of the conspiracy are admissible against a conspirator whose participation in the conspiracy ended when he was arrested. United States v. Marques (9th Cir.) 600 F.2d 742.

DEATH PENALTY - PICTURES

Pictures of three bullet holes in the face of a victim that defendant killed when defendant was 15 years old were properly admitted during the penalty phase of the trial for a subsequent killing. Even more surprising, the constitutionality of the 1977 California death penalty statute is upheld. People v. Frierson (Cal.) 599 P.2d 587.

DOUBLE JEOPARDY - MISCONDUCT

A mistrial because the government acted improperly did not bar a retrial, since there was a finding that there was no prosecutorial misconduct. United States v. Phillips (9th Cir.) 600 F.2d 186.

DOUBLE JEOPARDY - MISTRIAL

Even if the prosecutor asked a wide-open question, that arguably called for the answer he got, the question was asked in good faith, so there was no overreaching when the prosecution asked for a mistrial after the answer. The defense witness's answer that the witness had been acquitted of the same charge that the defendant was on trial for constituted manifest necessity for a mistrial, and double jeopardy did not attach. State v. Dunn (N.M.App.) 599 P.2d 392.

EXCITED UTTERANCE - HEARSAY

The court did not abuse its discretion by admitting statements, under the excited utterance exception to the hearsay rule, by the murder victim identifying the defendant as her attacker. Although some of the statements were made in response to questions from a person coming to her aid, the statements were admissible since they were uttered under "stress of nervous excitment" and the victim had no opportunity for reasoned reflection. People v. Edwards (N.Y.) 392 N.E.2d 1229.

FLIGHT

Flight immediately after the commission of a crime and immediately prior to trial both support an inference of consciousness of guilt, and the fact that other reasons might support the defendant's decision to take flight does not itself make a flight instruction improper. United States v. Hernandez-Miranda (9th Cir.) 601 F.2d 1104.

HOMICIDE - CAUSE OF DEATH

Testimony that blows to fatty areas could dislodge fat into the bloodstream, which would block the arteries just like a clot, and that in the witness's opinion the cause of death was this "massive pulmonary fat embolism" caused by extensive blunt trauma (inflicted by defendant) was sufficient proof that defendant caused the death of the victim. White v. State (Ala.Cr.App.) 373 So.2d 356.

PRIOR CONVICTIONS

The 1958 embezzlement conviction of a state's witness could not be used to impeach the witness during a 1977 trial. United States v. Perez (10th Cir.) 600 F.2d 782.

IDENTIFICATION - LAY WITNESSES

The opinion testimony of two government lay witnesses, who were close acquaintances of the defendant, identifying the defendant as one of two robbers depicted in surveillance photos taken of the robbery were admissible under Rule 701, notwithstanding that the surveillance photos were also submitted to the jury. (Citing 9th Circuit authority) United States v. Ingram (10th Cir.) 600 F.2d 260.

IMPEACHMENT - COMMENT ON SILENCE

Where the defendant testified that he had killed the victim and that the victim had attacked him with a gun, the prosecution could show that the defendant made no mention of the victim's use of a gun during a post-arrest statement to the police. Since the defendant made a statement to the police regarding the incident, post-arrest comment on silence reasoning was not applicable. Hill v. United States (D.C. App.) 404 A.2d 525.

JUVENILES

A juvenile who was of average maturity, knew right from wrong, would probably have been released in a few months when he reached 18, had committed an armed robbery in an aggressive manner, and placed another's life in jeopardy was properly certified as an adult. C.S.M. v. State (Okl. Cr.) 599 P.2d 426.

MARITAL PRIVILEGE - INSTRUCTIONS

Where the defendant was charged with running over his mother-in-law with a pickup truck, the court properly admitted testimony that the defendant's wife made the excited utterance, "he ran over my mother". The marital privilege does not extend to bar a witness from relating an excited utterance by a spouse. Where the defense attorney argued that the prosecution called only one witness to the offense, the court properly instructed the jury that the defendant's wife, who was also present, had not been called because of the marital privilege. United States v. Tsinnijinnie (9th Cir.) 601 F.2d 1035.

MIRANDA

A police officer's failure to recall whether the defendant affirmatively acknowledged understanding his Miranda rights is not determinative on the issue of whether the defendant knowingly and voluntarily waived his rights. The crucial issue is whether the totality of the circumstances demonstrates that the defendant was mentally capable of actually understanding his rights and voluntarily waived them. (Here the conflicting evidence was resolved in favor of the State.) State v. Noel (N.H.) 404 A.2d 290.

PICTURES - MUGSHOTS

Showing the jury and the witness the pictures the victim picked from the lineup, without altering their character as obvious mugshots, complete with numbers, was error and will not be tolerated - but it was harmless error here. The victim had known defendant prior to the robbery, recognized him during the robbery and never waivered in the identification. State v. Gutierrez (N.M.App.) 599 P.2d 385.

PLEA BARGAINING - STATEMENTS

The Ninth Circuit adopts a two part test to determine whether a defendant's statements are made in the course of plea bargaining and are subject to suppression under Rule 410. The defendant must exhibit "an actual subjective expectation to negotiate a plea at the time of the discussion" and his expectation must be reasonable under the totality of the circumstances. Here defendant knew the only promise was that his cooperation would be relayed to the prosecutor, so although he may have subjectively intended to plea bargain, there was no plea bargaining. United States v. Pantohan (9th Cir.) 602 F.2d 855.

PRIOR BAD ACTS - ROBBERY

The court did not err in allowing the robbery victim to testify that she had been held up three times in the months preceeding the offense. The evidence of prior crimes was expressly disassociated from the defendant's crime, and it was relevant since it showed that the victim had an increased awareness of what to note about a robbery suspect's appearance. State v. Valentine (Mo.) 584 S.W.2d 92.

PROBATION CONDITION

The court did not abuse its discretion in imposing a probation condition on the defendant which required him to accept full time employment without any salary at a charitable institution approved by the probation department and the court for a period of two years. United States v. Arthur (4th Cir.) 602 F.2d 660.

RAPE - INSTRUCTIONS

Admission of evidence of a prior rape and a prior attempted rape to prove identity and corroborate the testimony of the prosecutrix is upheld, as are jury instructions to that effect. People v. Pendleton (Cal.) 599 P.2d 649.

SERIOUS BODILY INJURY

A broken left femur and facial scarring, both still requiring treatment three months after the accident, constituted serious bodily injury. People v. Myers (Colo) 599 P.2d 891.

SEARCH AND SEIZURE

The defendant, by parking on private property without permission, leaving an opened whiskey bottle in plain view on the vehicle, and leaving the doors unlocked and the keys in the ignition, demonstrated objectively that, at the time, he did not have any reasonable expectation of privacy in the passenger area of his vehicle. Accordingly, the police did not violate his Fourth Amendment rights by searching a marijuana-filled shopping bag in plain view on the front seat. State v. Tungland (Minn.) 281 N.W.2d 646.

The existence of federal statutes, regulations and tariffs which authorize searches of packages by airline employees does not sufficiently involve the government in such searches as to subject them to the Fourth Amendment. A search by an airline employee is really just the exercise of a common carrier's common law right to inspect all packages and refuse shipment of suspicious or dangerous articles. United States v. Edwards (1st Cir.) 602 F.2d 458.

Stopping all cars at a roadblock and checking for drivers licenses is constitutionally valid, the officers had received complaints that some of the factory workers using that road did not have licenses. The stop was not a random stop, and they were checking all drivers. As a result, evidence found during one car stop was properly admitted at trial. Miller v. State (Miss.) 373 So.2d 1004.

STATEMENTS - ALIBI

A defendant's false alibi statement made before trial may be admitted at trial as evidence of consciousness of guilt. The fact that the defendant did not raise any alibi defense during the trial is irrelevant. State v. Kasper (Vt.) 404 A.2d 85.

WITNESSES

An instruction on the purpose and requirements for admission to the federal witness protection program (verbatim in opinion) was correct and properly given. The defense was making hay with the fact that the witness was receiving government money. United States v. Partin (9th Cir.) 601 F.2d 1000.

WITNESSES - CROSS-EXAMINATION

The trial court properly limited the scope of defense cross-examination of a witness so as to permit him to maintain his concealed identity. The witness was in the federal Witness Protection Program and a serious threat had been made on his life. United States v. Watson (2nd Cir.) 599 F.2d 1149.

EVIDENCE DESTRUCTION

The mistaken, good-faith destruction of the evidence after defendant's initial conviction did not deny defendant's right of confrontation, since the lab expert who analyzed the evidence was available. Defendant was not denied due process either. She never contested the fact the evidence was a narcotic drug and showed no prejudice from the evidence destruction. State v. Cruz (Ariz.App.) 600 P.2d 1129.

EVIDENCE - MIRANDA

Photographs of defendant wearing boots and dentures found near the scene of the crime, taken after he demanded counsel, did not violate either the Fifth Amendment or the Sixth Amendment, since the acts were not communicative or testimonial in nature. Defendant's statements thanking the officers for the dentures and saying he needed glue to make them work were volunteered and properly admitted. State v. Bridges (Ariz.App.) 600 P.2d 756.

AGGRAVATING CIRCUMSTANCES

The court could allow the murder victim's mother to testify during the presentence hearing regarding the victim's age and mental status. Corn v. Hopper (Ga.) 257 S.E.2d 533.

ARGUMENT

The court did not err in refusing to allow the defense attorney to refer during final argument to the dismissal of charges against other persons who had been arrested with the defendant. These dismissals were not relevant to the issue of the defendant's guilt and evidence regarding them had properly been excluded at trial. State v. Spencer (La.) 374 So.2d 1195.

ARREST

An officer may constitutionally keep a vehicle under surveillance for reasons of his own until it violates an ordinance, then stop it for the observed violation. His motives for the stop aren't relevant to the question of the validity of the stop. State v. Carter (Or.) 600 P.2d 873.

CONSPIRACY

Defendant's conviction for conspiracy to kill her husband is upheld even though the only other members of the conspiracy were police or the "hit man," who called the police as soon as he believed that defendant was serious. Garcia v. State (Ind.) 394 N.E.2d 106.

ARREST - KNOCK AND ANNOUNCE

"An officer may arrest for a misdemeanor committed in his presence and the fact that a defendant is later formally charged with another offense does not invalidate an otherwise lawful arrest." Further, knock and announce is not required where to do so would be useless; where an officer had been standing in an open doorway for several minutes in full view of both occupants, he was not required to knock and announce before entering to seize marijuana in plain view. State v. Chrisman (Wash.App) 600 P.2d 1316.

ARREST - SEARCH AND SEIZURE

Even if the defendant's arrest in his home was unlawful, the evidence seized from the home was not subject to suppression because the agents obtained a valid search warrant before conducting the search. The supporting affidavit did not mention the arrest or use any information obtained as a result of the arrest. United States v. Hanser (9th Cir.) 603 F.2d 94.

DOUBLE JEOPARDY

The Fifth Amendment does not preclude federal and state prosecutions for crimes against each sovereign, which involve the same acts. Delay v. United States (8th Cir.) 602 F.2d 173.

DRUGS AND NARCOTICS

Evidence of a prior drug sale to a third party was properly admitted to show motive, intent, absence of accident or mistake and to contradict defendant's story he was coerced into making the sale. State v. Madera (Wash.App.) 600 P.2d 1303.

DRUGS AND NARCOTICS - WITNESSES

Barring the defense from asking about the key state's witness home address was proper, inter alia there was testimony the defendant had a contract out on the witness. United States v. Contreras (5th Cir.) 602 F.2d 1237.

EQUAL PROTECTION - IMMUNITY

The fact that the State granted immunity to one eye witness/co-participant and that the State and the court refused to grant immunity to another coparticipant who testified for the defendant was not a violation of equal protection. Walters v. State (Ind.) 394 N.E.2d 154.

EVIDENCE DESTRUCTION

Destruction of latent prints taken from beer cans and cigarettes at the scene of the rape did not result in dismissal of the charges here. The fingerprint officer testified he would have saved useful fingerprints, the very detailed description matched defendant, he was positively identified by the victim, and other persons' prints on the items purchased just before the rape would not have exonerated defendant. State v. Wilkes (Wash.App.) 600 P.2d 1305

HABEAS CORPUS - STANDING

The defendant's court-appointed counsel, who had been discharged at defendant's request, had no standing to petition for habeas corpus on his behalf in the absence of some showing that the defendant lacked capacity to pursue such federal relief. The case involved Jesse Bishop, who was recently executed in Nevada. Lenhard v. Wolff (9th Cir.) 603 F.2d 91.

IDENTIFICATION - PRELIMINARY HEARING

A defendant has no right to waive his presence at the preliminary hearing; and the prosecution could compel his attendance for the purpose of allowing the witness to make an in-court identification of the defendant. The State has a right to adduce evidence of the identities of the perpetrators of crimes in the form of in-court identification testimony of eyewitnesses. The procedure used here, the defendant's presence at the preliminary hearing, could not be challenged on due process grounds since the defendant had in-court counsel. People v. Green (Cal.App.) 157 Cal. Rptr. 520.

IMPLIED CONSENT - DWI

Taking blood from an unconscious driver, who can not exercise his statutory right to refuse a blood test, is constitutionally proper, and suppressing the results constituted reversible error. State v. Garner (Kan.App.) 600 P.2d 1166.

INDIGENTS - EXPERT WITNESSES

A defendant is not entitled to retain, at the State's expense, a psychiatrist of his own choosing. Norris v. State (Ind.) 394 N.E.2d 144.

MIRANDA

Where the defendant had made a knowing and voluntary waiver of his Miranda rights, his waiver was not vitiated by the failure of the police to inform him that the robbery victim had died. The defendant does not have a right under Miranda to be informed of the charges against him at the time of the interrogation. People v. Neely (Cal.App.) 157 Cal.Rptr. 531.

PROBATION CONDITION - RESTITUTION

Where the defendants plead guilty to a charge of conspiracy to evade import duties in return for the dismissal of a number of substantive charges, the court did not err in imposing restitution as a probation condition. Although the conspiracy itself was an inchoate crime which caused no loss to the government, the court properly ordered restitution for actual damage which the indictment charged as being caused by the operation of the conspiracy over time. United States v. Tiller (2nd Cir.) 602 F.2d 30.

SEARCH AND SEIZURE - ARREST

Where the police were executing an arrest warrant for the defendant and had knowledge that he was armed they could investigate a lump in the room's carpet and seize a gun concealed under the carpet. The warrantless search and seizure was valid as incident to the defendant's arrest despite the fact that he was handcuffed at the time. (Citing several other jurisdiction cases.) State v. Cherry (N.C.) 257 S.E. 551.

SEARCH AND SEIZURE - PLAIN VIEW

Where a police officer observed a heroin transaction taking place in plain view and the participants subsequently fled and hid the heroin, the officer had authority, under the plain view exception to the Fourth Amendment warrant requirement, to search for and seize the heroin. United States v. Ortiz (9th Cir,) 603 F.2d 76.

VOLUNTARINESS OF STATEMENTS

An assault on defendant by the partner of the dead narcotics officer was not made with the intention of forcing a confession. The defendant admitted to State's attorneys that he was treated well after the arrest and was repeatedly warned after receiving medical attention. Therefore, his statements were voluntary and properly admitted even though he claimed the 13 stitches broken nose attack prompted the statement. People v. Lewis (Ill.) 393 N.E.2d 1098.